

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CAVER,

Defendant-Appellant.

UNPUBLISHED

May 29, 2003

No. 229709

Wayne Circuit Court

LC No. 99-011840

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b (victim under the age of thirteen). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to twenty-five to forty-five years' imprisonment. He appeals as of right. We affirm.

Defendant is the victim's uncle. This case arises out of defendant's sexual assault on his nine-year-old nephew while the child was visiting at his grandmother's house.

I

Defendant first argues that the trial court abused its discretion when it denied his motions for mistrial. This Court reviews a trial court's decision on a motion for mistrial for an abuse of discretion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990); *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion will be found only where denial of the motion deprived the defendant of a fair and impartial trial. *Manning, supra*.

Defendant first moved for a mistrial following an emotional outburst by the victim's grandmother in which she remarked to defendant, "You know what you did to my baby." The court ordered a break in the proceedings and excused the jury. Defendant subsequently moved for a mistrial, which the court denied. At defendant's request, however, the court agreed to give a cautionary instruction, and when the jury returned, the court instructed it to disregard the witness' remark.

This Court presumes that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the

evidence would be “devastating” to the defendant. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). In this case, we are satisfied that the court’s instruction was sufficient to cure any prejudice caused by the witness’ emotional outburst. Accordingly, the trial court did not abuse its discretion when it denied defendant’s motion for mistrial.

Defendant’s second and third motions for mistrial were based on separate incidents in which two police witnesses made reference to a polygraph. It is well settled that evidence of a polygraph examination is not admissible at trial. *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, not every reference to a polygraph examination requires reversal. *Nash, supra* at 98. To determine whether reversal is required, several factors should be analyzed, including: (1) whether defendant objected and/or sought a cautionary instruction, (2) whether the reference was inadvertent, (3) whether there were repeated references, (4) whether the references were made in an attempt to bolster a witness’ credibility, and (5) whether the results of the polygraph were actually admitted or merely the fact that a test had been conducted. *Id.*, quoting *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982).

In this case, the references to a polygraph were isolated and apparently inadvertent. Most significantly, the results of the test were not made known to the jury. Although defendant argues that the references were unduly prejudicial because the entire trial consisted of a credibility contest between defendant and the victim, the prosecutor presented evidence of defendant’s confession in which defendant admitted committing the charged act of first-degree CSC. Further, neither of the references to a polygraph was made in the context of attempting to bolster the victim’s credibility, or to undermine defendant’s credibility. The trial court offered to give a cautionary instruction, but defendant declined for strategic reasons. We conclude that, under the circumstances, the isolated references to a polygraph did not deny defendant a fair trial. Thus, the court did not abuse its discretion in denying defendant’s motions for mistrial.

II

Next, defendant contends that he was deprived of a fair trial because of the admission of evidence that the victim had accused his stepbrother of committing a sexual assault against him. Because defendant did not object to this evidence at trial, appellate relief is precluded absent a showing of plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although defendant argues that the evidence was irrelevant and prejudicial because it created sympathy for the victim, the record reveals that defense counsel asserted in his opening statement that the victim had made false accusations against his stepbrother. Further, during his cross-examination of the victim’s grandmother, defendant elicited that the victim had been discovered playing under the covers with one of his cousins while they were naked. At that time, the victim told family members that his stepbrother had sexually abused him. The parties stipulated that the victim subsequently recanted these claims and all charges against the stepbrother were dismissed. During closing argument, defense counsel argued that the victim’s testimony was full of contradictions and inconsistencies. Counsel referred to the victim’s false accusations against his stepbrother as demonstrating that the victim was not credible.

It is apparent from the record that defense counsel used the challenged evidence to attack the credibility of the victim and create doubt in the minds of the jury. To the extent defendant asserts that the evidence was admitted pursuant to MRE 404(b), he is mistaken. The allegations that the stepbrother sexually abused the victim were not offered under that rule and do not constitute “other acts” as contemplated by the rule. See *People v Sabin (After Remand)*, 463 Mich 43, 55-59; 614 NW2d 888 (2000). Defendant has failed to show that the evidence either constituted plain error or affected his substantial rights.

III

Next, defendant argues that evidence that the victim reported defendant’s alleged sexual abuse to his grandmother, mother, aunt, and a doctor all constituted inadmissible hearsay. Again, because defendant failed to object to this evidence at trial, he must demonstrate a plain error affecting his substantial rights. *Carines, supra* at 763.

In his opening statement, defense counsel suggested that the victim had lied and was improperly influenced by others. Against this backdrop, the challenged testimony was admissible under MRE 801(d)(1)(B), to rebut an express or implied charge of recent fabrication or improper influence or motive. See *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). Thus, plain error has not been shown.

IV

Defendant next argues that the prosecutor knowingly elicited false testimony from a police officer, thereby denying him a fair trial. We find no merit to this issue. The disputed testimony occurred in the context of discussion regarding defendant’s police interview. When the investigating police officer was first questioned about why another police officer would watch his interview with defendant over a closed-circuit TV, he answered that it was “a team-concept polygraph.” When the prosecutor resumed this line of questioning after the break, the officer explained that another officer sometimes observed an interview over a closed-circuit TV as a safety measure. Defendant now argues that, because the officer gave a different answer when questioning resumed, this indicates that the prosecutor knowingly elicited false testimony in an effort to mislead the jury concerning an important aspect of the case. We disagree.

There is nothing in the record indicating that the officer’s answer was false or deceptive, as opposed to an alternative explanation. Further, there is no indication that the jury was “misled” about an “important aspect of the case.” The purpose of the inquiry was to connect the second officer’s testimony to the investigating officer’s testimony. It did not involve a significant matter critical to deciding defendant’s guilt or innocence. Accordingly, we find no merit to this issue.

V

Defendant next argues that reversal is required because the verdict was read in open court by the trial court, rather than the jury foreperson. Defendant’s failure to object to the reading of the verdict precludes appellate relief absent a plain error affecting defendant’s substantial rights. *Carines, supra*. The applicable court rule, MCR 6.420(A), requires that “[t]he jury must return its verdict in open court.” The rule does not provide that the verdict must be read by the jury

foreperson. Here, the jury returned its verdict in open court and the trial court read the verdict. We find defendant has not shown a plain error. Regardless, after the court read the verdict, the jurors were individually polled and each juror agreed that the verdict as read by the trial court was his or her individual verdict. Thus, if there was an irregularity, defendant has not demonstrated that his substantial rights were affected. Accordingly, appellate relief is not warranted.

VI

Next, defendant argues that the trial court erred when it instructed the jury that it could find him either guilty or not guilty of the charged crimes. We conclude that defendant waived this issue by indicating on the record that he was satisfied with the verdict form. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Even if the issue was not waived, appellate relief would not be warranted because the trial court's instruction, which comports with CJI2d 3.11(1) - (4), does not constitute plain error. *Carines, supra*; *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995).

VII

Defendant also argues that numerous improper arguments by the prosecutor deprived him of a fair trial. Defendant did not object to any of the allegedly improper remarks at trial. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant cites ten instances of alleged improper prosecutorial arguments asserting that the prosecutor improperly testified to facts not in the record, improperly relied on inadmissible hearsay, and impermissibly vouched for the credibility of witnesses. After review of the record, we find no plain error stemming from the prosecutor's arguments. Considered in context, the challenged remarks were based on the evidence and reasonable inferences drawn therefrom, and constituted permissible argument. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995); *People v Potra*, 191 Mich App 503, 513; 479 NW2d 707 (1991); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

VIII

Finally, defendant argues that trial counsel was ineffective for not objecting to the matters discussed above. In light of the foregoing discussion, we find no merit to this issue. Defendant has failed to overcome the presumption of effective assistance of counsel. *People v Rogers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood